

# Procurement & Contracting

Maintaining Eligibility for FEMA Funding



Yakima County – October 2009

# Federal Procurement Requirements

- Follow most restrictive of local, state, & federal laws
- Perform cost analysis for every procurement action
- Clearly show rationale for method of procurement, selection of contract type, adequate competition, and price basis
- Must have full and open competition

***Make sure all parties know that the contract involves federal funds***

# Federal Contracting Standards

- Must maintain records in sufficient detail to reflect history of procurement, including rationale for the method of procurement, the basis of contractor selection, and the basis for the contract price
- Prohibited from using Time and Materials contracts unless there is no other contract suitable and the contract includes a ceiling price that the contractor exceeds at its own risk
- **Prohibited** from using a Cost plus Percentage of Cost contract arrangement

# Federal Audit Findings & Issues

- Noncompetitive contracts continuing after emergency periods
- No cost or price analysis for noncompetitive contracts
- Use of inappropriate contracts – Cost plus Percentage of Cost, Verbal, and Time & Materials
- Poor contract monitoring
- Absence of procurement history (documentation)
- Unreasonable contract prices
- Failure to ensure compliance with federal contract provisions
- Lack of Internal Controls (contract administration)

# What is the OIG?

- The Homeland Security Act of 2002 provided for the establishment of an Office of Inspector General in the Department of Homeland Security to:
  - Prevent waste, fraud and abuse
  - Keep Congress & the Secretary of DHS fully informed through audits, inspections and investigations of activities
- The OIG-DHS is performing 50 audits a year of FEMA projects
  - One audit reviewed over 1000 Public Assistance project worksheets for contract irregularities

# Costs & Reasonable Reimbursement

- Normal procedures must not be altered because of the potential for reimbursement from Federal funds
- Reasonableness Criteria
  - Must be fair and equitable
  - Applicable to type of work
  - “Prudent” person decision
  - Is cost ordinary and necessary for facility and type of work?
  - Were actions taken in prudent manner?
- Reasonable costs can be established through
  - Historical documentation for similar work
  - Average costs for similar work in the area
  - Published unit costs (RS Means)
  - FEMA cost codes



# Accepted Procurement Methods

- Small purchase procedures
- Sealed bids
- Competitive proposals
- Non-competitive proposals



Thurston County – March 2001

# Small Purchase Procedures

- Small purchase procurement is an informal method for securing services or supplies that do not cost more than **\$100,000** by obtaining several price quotes from different sources

**Note: The Federal limit for small purchases is \$100,000 - the State limit is \$300,000**

Always use the most restrictive limit in effect for your jurisdiction



# Sealed Bids

- This is a formal contracting method where:
  - The bids are publicly advertised and solicited
  - Cost analysis is required
  - The contract is awarded to the lowest responsible bidder and lowest price
  - This method is the preferred method for procuring construction contracts

# Competitive Proposals

- Similar to sealed bid procurement
- Cost analysis is required
- Contracts are awarded on the basis of contractor qualifications instead of on price
- This method is generally used for procuring architectural or engineering professional services

***Note: Consultant agreements and Personal Services contracts fall into this category***

# Non-Competitive Proposals

- A proposal is received from only one source
- Document why you chose this type of contract
- Cost-analysis is required
- Only use when the award of a contract is not feasible under small purchase procedures, sealed bids, or competitive proposals, and one of the following circumstances applies:
  - The item is available only from a single source
  - There is an emergency requirement that will not permit delay
  - FEMA may authorize noncompetitive proposals
  - Solicitation from a number of sources has been attempted, and competition is determined to be inadequate.

# Emergency Contracting

- Emergency Proclamation must waive the competitive bid process and be in place prior to signing any contracts
- Document all actions
- Ensure Cost Analysis is performed
- Get your contracting office involved ahead of time
- Follow up within a short period with open, competitive process

# Acceptable Contracts

- Lump Sum Contracts
- Unit Price Contracts
- Cost Plus a Fixed Fee Contracts





# Lump Sum Contracts

- Competitive process
- Can be either sealed or competitive negotiation
  - Sealed Bid: Contractors bid a firm fixed price bid including all labor, equipment, materials, overhead, & profit
  - Competitive: Contractors submit proposals based on pre-stated factors
- Well defined & reasonable scope of work
- Amendments or Change Orders are by exception
- Except for rare amendments, contract price will not change

# Unit Price Contracts

- Often used when quantities needed to do the work are not known in advance
- Units of work determined in advance by unit of measure; i.e. CY, LF
- Competitive process
- Bid price is “in place” cost including labor, materials, equipment, overhead, & profit
- Bid price is all-inclusive - **not broken out**
- Often awarded on an annual basis to multiple firms to insure availability & price competition
- Prices must be deemed reasonable

# Cost Plus a Fixed Fee

- Used when full extent of scope cannot be fully predicted in advance
- Contractor is reimbursed for reasonable, with-in scope costs
- Contractor bids a fixed fee for the contract to include overhead & profit

# Generally Unacceptable Contracts

- Time & Materials Contracts
- Time & Equipment Contracts
- Piggyback Contracts

*FEMA strongly discourages these types of contracts*

# Time & Materials Contracts

- State guidelines must be followed
- Accepted only in very limited situations
- Generally not more than 70 hours for work that is necessary immediately after a disaster when a clear scope of work cannot be developed
- Requirements
  - Must have a written scope
  - Must have a cost ceiling or “not to exceed” provision
  - Strict monitoring & documentation of expenses
  - Cost must be reasonable & work must be approved and within the scope
  - Prescribed duration for emergency work only



# Time & Materials Contracts

- Cost structure for labor to include overhead & profit
  - Overhead and profit **must not** be broken out separately
- Use FEMA approved equipment rates
- Competition still a requirement unless emergency occurs that requires immediate response or there is no available competition
- Check on debarred/suspended status

# Piggyback Contracts

- A concept of expanding a previously awarded contract.
- Does not meet the requirements of 44 CFR 13
  - it is non-competitive
  - may have an inappropriate price structure
- This type of contract is not eligible.
  - However, FEMA may separately evaluate and reimburse costs it finds fair and reasonable. This is extremely rare!
  - Limited dollar amount

# Unacceptable Contracts

- Costs plus a percentage of Cost
  - Specifically disallowed under 44 CFR 13.36 (f)(4)
- Contingency Contracts
  - Specifically disallowed under federal procurement guidelines
  - There is never an advance assumption of federal reimbursement
- Verbal Contracts

# Verbal Contracts

- No verbal contracts
- Specifically prohibited under federal procurement regulations
- On an emergency basis, an agency may grant an on-site, verbal authorization of a contract. This must be followed up immediately (*within 3 days*) by a written contract that meets all federal procurement regulations.

# EMD Areas of Concern

- Improper contract types on consultant contracts
- Force Account Contracts
- Intra-Agency / Inter-Departmental charges



Thurston County – December 2007



# Consultant Contracts

- Applicants utilizing consultant agreements administered and paid with a cost plus percentage of cost methodology
  - Cost plus percentage contracts are not eligible for reimbursement
  - The OIG has questioned these contracts and issued audit findings
  - Use of these types of contracts jeopardizes the eligibility of the contracted consultant engineering services **and the entire project**

# Consultant Contracts (cont)

- It is acceptable to utilize consultant engineering services on projects funded with monies from FEMA's Public Assistance program for
  - Special engineering services (such as surveying or geotechnical studies)
  - Design & construction inspection
  - Project management in the design or construction phases of a project
- FEMA's regulations for procurement of consultant engineering services are established in 44 CFR 13.36

# Consultant Contracts (cont)

- Applicants may use competitive proposals for **qualifications-based** procurement of architectural & engineering professional services:
  - Applicants must perform a cost or price analysis
  - Types of contracts allowed
    - Fixed-price or lump sum
    - Cost reimbursement - unit price or cost plus a fixed fee
    - The fixed fees are to be negotiated as a separate element of the price
  - Cost plus a percentage of cost and/or percentage of cost methods of contracting are not allowed

# Consultant Contracts (cont)

- Contract arrangement - Cost plus fixed fee

## Correct Methodology:

Estimated consultant contract cost is \$500,000, with a negotiated 25% fixed fee. This means the fee is \$100,000 and the cost for work is \$400,000 since profit and overhead are built in. The fee stays static regardless of final actual costs.

## Unacceptable Methodology:

For the same scope of work, the costs for the work comes in at \$500,000. The consultant bills the jurisdiction \$125,000 for the fixed fee. This is not a fixed fee. This is a cost plus percentage of cost contract.

# Force Account Contracts

- The WSDOT LAG manual contracting guidelines allow for Force Account Line items with this structure:
  - Labor plus a set percentage for profit
  - Equipment plus a set percentage for profit
  - Materials plus a set a percentage for profit
- Avoid adding Force Account as a line item to contracts
- Some jurisdictions have greatly expanded this line item structure to make it a Force Account Contract
- **FEMA views this as a Cost Plus Percentage of Cost contract – prohibited by 44 CFR 13.36 (f)(4)**



# Intra-Agency Charges

- Currently, jurisdictions such as counties are seen as single entities
- Under PA this means a jurisdiction's Public Works department and Parks department are part of the same application
  - FEMA does not allow an applicant to charge itself overhead or mark-up
- A set fee for a specific item may be eligible. For example: right-of-way easements, permits, surveying, etc.
- Hourly labor charges for services cannot be paid with mark-up

# What You Can Do Now...

- Evaluate your contracting procedures and identify the differences
- Develop contract formats and solicitation processes ahead of time
- Look at pre-event, pre-priced, competitively obtained contracts. This will help ensure compliance & speedy response & recovery
- Review & amend your established emergency contracting procedures so they are in line with federal procurement regulations

# Key PA/PDA Milestones

- Request a disaster – 30 days from the end of the incident period
- Request Public Assistance – 30 days from date of declaration
- Report all damages to FEMA/State PACs– within 60 days from the kickoff meeting
- Complete category A & B emergency work – 6 months from date of declaration
- Complete category C-G permanent repairs – 18 months from date of declaration

# Debarred Contractor Listing

- Federal Debarment List
  - [www.EPLS.gov](http://www.EPLS.gov)
- Contractor Bond & Insurance information
  - [www.lni.wa.gov](http://www.lni.wa.gov)
- State UBI Information
  - [www.dor.wa.gov](http://www.dor.wa.gov)
- Secretary of State – Corporation Information
  - [www.secstate.wa.gov](http://www.secstate.wa.gov)

# Staff Resources

- Gary Urbas  
Deputy SCO  
Public Assistance  
253-512-7402  
[g.urbas@emd.wa.gov](mailto:g.urbas@emd.wa.gov)
- Alysha Kaplan,  
Regional PA Supervisor  
253-512-7434  
[a.kaplan@emd.wa.gov](mailto:a.kaplan@emd.wa.gov)
- Jill Nordstrom  
Regional PA Supervisor  
253-512-7428  
[j.nordstrom@emd.wa.gov](mailto:j.nordstrom@emd.wa.gov)

PA Fax number:  
253-512-7405


# Public Assistance Coordinators

Evelyn Peters  
[e.peters@emd.wa.gov](mailto:e.peters@emd.wa.gov)  
253-512-7423

Jon Holmes  
[j.holmes@emd.wa.gov](mailto:j.holmes@emd.wa.gov)  
253-512-7429

Matt Stoutenburg  
[m.stoutenburg@emd.wa.gov](mailto:m.stoutenburg@emd.wa.gov)  
253-512-7452

# Public Assistance Website

 **Washington Military Department  
Emergency Management Division**

Friday, October 01, 2010


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## Public Assistance


### County Emergency Management Contacts



Public Assistance is disaster relief through the federal government supplementing efforts of state and local governments to return a disaster area to pre-disaster conditions.



These efforts primarily address the repair and restoration of public facilities, infrastructure, or services which have been damaged or destroyed.



Mailing address:  
**Public Assistance Program**  
Bldg 20-B, MS: TA-20  
Camp Murray, WA 98430  
FAX: (253) 512-7405

<http://www.emd.wa.gov/disaster/WashingtonMilitaryDepartmentEmergencyManagementDivision-DisasterAssistance-PublicAssi.shtml>



# Waterfront Property

## December 2011

